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for rejections

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~356~~ 126

R. A. WILLS, W. S. EDMUNDS, P. S. EDMUNDS, AND J. C. EDMUNDS, COPARTNERS, AS WILLS, EDMUNDS & CO., PLAINTIFFS IN ERROR,

vs.

THOMAS RUSSELL, LATE COLLECTOR OF CUSTOMS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

FILED MARCH 31, 1877.

SUPREME COURT OF THE UNITED STATES.

No. 356.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the district of Massachusetts, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between R. A. Wills, of Newburyport, in the commonwealth of Massachusetts, W. S. Edmands and P. S. Edmands, both of Calcutta, India, and J. C. Edmands, of Brooklyn, in the State of New York, copartners under the style and firm name of Wills, Edmands & Co., having a principal place of business in Boston, Massachusetts, plaintiffs, and Thomas Russell, formerly collector of the customs for the revenue district of Boston and Charlestown, defendant, in a plea of the case, a manifest error hath happened, to the great damage of the said plaintiffs, as by their complaint appears: We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October, current, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the seventh day of October, in the year of our Lord one thousand eight hundred and seventy-six.

JOHN G. STETSON,
Clerk of the Circuit Court of the United States,
District of Massachusetts.

Allowed by—

DAN'L CLARK,
U. S. Judge, ass'd to Mass. Dist.

Sufficient service of this writ of error, and of a citation thereunder, is hereby acknowledged.

GEORGE P. SANGER,
U. S. Att'y, for Def't in Error.

2 Circuit court of the United States, district of Massachusetts, ss:

And now, here, the judges of the circuit court of the United States in and for the district of Massachusetts make return of this writ by annexing hereto and sending herewith, under the seal of the said circuit court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof I, John G. Stetson, clerk of said circuit court of the United States in and for the district of Massachusetts, have hereto set my hand and the seal of said court this seventh day of October, A. D. 1876.

[SEAL.] JOHN G. STETSON, *Clerk.*

3 UNITED STATES OF AMERICA,
Massachusetts District, ss:

At a circuit court of the United States for the first circuit, begun and holden at Boston, within and for the district of Massachusetts, on Friday, the fifteenth day of October, in the year of our Lord one thousand eight hundred and seventy-five.

Before the honorable George F. Shepley, circuit judge.

R. A. WILLS, OF NEWBURYPORT, IN THE COUNty of Essex and Commonwealth of Massachusetts; W. S. Edmands and J. C. Edmands, both of Calcutta, India, and J. C. Edmands, of the city of Brooklyn and State of
4 New York, copartners under the style and firm name of Wills, Edmands & Co., having a principal place of business at said Boston, plaintiffs,

v.

THOMAS RUSSELL, COLLECTOR OF THE CUStoms for the revenue district of Boston and Charlestown, defendant.

In a plea of the case, for that the said defendant, on the day of the purchase of this writ, being indebted to the plaintiffs in 83 $\frac{19}{100}$ dollars, in consideration thereof promised to pay the same amount to the plaintiffs on demand; yet he has not paid the same; and also for that on the day of the purchase of this writ, the defendant being indebted to the plaintiffs in the sum of eighty-three and $\frac{19}{100}$ dollars, demanded, exacted, and received of the plaintiffs by the defendant, then and now collector of the customs for the revenue district of Boston and Charlestown, under color of a law of the United States for the col-
5 lection of the duties on imports (and by the plaintiffs paid under protest), and before that time had and received by the defendant to the plaintiffs' use, in consideration thereof promised to pay the same when he should be thereto afterward requested. Yet the said defendant has not paid the same or any part thereof, though thereto afterwards requested, to the damage of the said plaintiffs, as they say, the sum of five hundred dollars.

The writ in this cause is dated the ninth day of December, A. D. 1872, and was entered at the May term of this court, A. D. 1873, when and where the parties appeared by their respective attorneys, and thence the cause was continued from term to term to this present term, when, on the second day of February, A. D. 1876, the following answer is filed, namely:

Answer of defendant.—Filed February 2, 1876.

6 And now comes the defendant, and for answer to plaintiffs' writ, declaration, and bill of particulars denies each and every allegation thereof, and further denies that plaintiffs have performed the conditions precedent necessary to enable the plaintiffs to maintain their action; of all which he puts himself upon the country.

By his attorney, GEO. P. SANGER,
U. S. Att'y.

Issue being joined, the cause, after a full hearing, the honorable Daniel Clark, district judge of the United States for the district of New Hampshire, duly assigned by honorable George F. Shepley, circuit judge, to hold said circuit court, sitting and holding said court, is committed to a jury sworn to try the issue, who, after hearing all matters and things concerning the same, return their verdict therein, and upon oath say, "The jury find for the defendant."

7 And now, to wit, May 13, A. D. 1876, it is considered by the court, the honorable John Lowell, district judge, sitting, that the plaintiffs take nothing by their said writ, and that the said Thomas Russell, defendant, recover of the said R. A. Wills, W. S. Edmands, F. S. Edmands, and J. C. Edmands, plaintiffs, his costs of suit, taxed at * * *

Upon the trial of the said cause, after the evidence was closed on both sides, and before the issue was submitted to the jury, the said R. A. Wills, W. S. Edmands, F. S. Edmands, and J. C. Edmands, plaintiffs, filed their bill of exceptions, which was sealed and allowed by the honorable Daniel Clark, district judge of the United States for the district of New Hampshire, duly assigned to hold said circuit court

8 as aforesaid, and is in the words and figures following, namely:

Plaintiffs' bill of exceptions.

This was an action to recover from a former collector of customs for the port of Boston the sum of 83.19 dollars paid as duties under protest upon an importation from India of jute rejections made by the Melrose Sept. 17, 1872. The pleadings may be referred to as part of this bill of exceptions. A duty of ten per cent. ad valorem had been assessed and paid under section 24 of the tariff act of March 2nd, 1861, also 5 dollars per ton under section 11 of the tariff act of July 14, 1862, and this action was to recover back the 5 dollars per ton.

The plaintiffs, after evidence tending to show payment by them to the defendant of the duties alleged, put in and read their protest for

9 the purpose of showing that they had complied with section 14 of the act of June 30, 1864, chap. 171 (13 Stat. at L., 214). A copy of said protest is hereto annexed as part of this bill of exceptions. The defendant claimed upon cross-examination the right to examine one of the plaintiffs who had testified in chief to the fact of payment of the duties and the fact of protest and appeal, but had not testified in chief as to what jute rejections were, or as to the contents of the protest, with a view of showing that jute rejections were a vegetable substance within the 11th section of the tariff act of July 14, 1862, chap. 163 (12 Stat. at L., 554).

The plaintiffs objected upon the ground that the witness had not testified in chief upon the subject inquired of, but the court overruled the objection and permitted the witness to be examined as to whether

10 jute rejections were a vegetable substance similar to the enumerated articles in the second clause of section 11 of the tariff act of July 14, 1862, what they were, and how jute was grown. To this ruling the plaintiffs excepted. The plaintiffs claimed that the vegetable substance not enumerated, named in the second clause of section 11 of the tariff act of July 14, 1862, were limited to vegetable substances used for cordage, and offered to show that in 1862 jute, Sisal grass, sun hemp, and coir, were used for cordage, and that jute rejections were not then and have never been used for cordage, and cannot be so used. This

profert of evidence was objected to and rejected by the court as immaterial. To this ruling the plaintiffs excepted. The plaintiffs asked the court to instruct the jury as follows:

First. That section 15 of the act of March 2, 1861, and section
11 11 of the act of July 14, 1862, and the provision in schedule C, section 2504 of the Revised Statutes of the United States, must be construed together and full effect be given to the words "used for cordage" as restrictive in the application of section 11 of the act of July 14, 1862, in the assessment of duties.

Second. That the words "used for cordage" by necessary implication of law are to be implied in section 11 of the act of July 14, 1862.

Third. That the provision in schedule C, section 2504 of the Revised Statutes of the United States, as follows, "vegetable substances used for cordage," was a legislative declaration on the first day of December, 1873, that such was the state of the law, and it is necessarily a construction of section 11 of the act of July 14, 1862, in connection with section 15 of the act of March 2d, 1861. It was the declared purpose of
12 Congress to collate all the statutes as they were at that date, and not to make any change in their provisions.

Fourth. If the jury shall find that commercially jute rejections were not used for cordage then they were not liable to the duty imposed by the defendant under section 11 of the act of July 14, 1862, and their verdict must be for the plaintiffs.

The court declined so to instruct the jury; but instructed them that it was for them to find whether or not jute rejections were of a class of non-enumerated vegetable substances similar to the enumerated articles in section 11 of the act of July 14, 1862. If they were, then the duty was properly assessed; if not, then their verdict must be for the plaintiffs. The jury returned a verdict for the defendant, and the plaint-
13 iffs excepted to the above rulings and refusals to rule, and pray that their exceptions may be allowed.

Allowed:

DAN'L CLARK,
U. S. Judge Presiding at Trial.

Copy of protest.

No. 316.
Man. 2424.
Rec'd Oct. 8th.

BOSTON, *Oct. 7th*, 1872.

SIR: We desire respectfully to protest against your action in assessing and exacting a duty of fifteen dollars per ton upon an importation made by us into this port of 125 bales of jute rejections, weighing 37,500 pounds, or about, per ship "Melrose," from Calcutta, and entered for consumption, on the 18th Sept., claiming that under existing laws this duty cannot be legally imposed upon this merchandise. Jute rejections are not enumerated in any tariff act in force, consequently can only be subjected to duty as a non-enumerated article. Jute rejections are unmanufactured. They are raw material and have not passed through any process of manufacture before being imported into the United States. Being non-enumerated and unmanufactured claim that upon importation they should be classified and subjected to a duty of ten per cent. ad valorem, under the twenty-fourth section of the act of March 2, 1861.

Should it be determined that, because of the process which this mer-

chandise passes through in being prepared for shipment, it is manufactured or partially manufactured, we then claim that it should be classified as a non-enumerated manufactured or partially manufactured article, under the section and act above referred to, and subjected to a duty of twenty per cent. ad valorem.

We pay this duty, amounting to two hundred and fifty-one dollars and six cents (251.06) gold, in order to obtain possession of our property, and shall hold you and the government responsible for its exaction.

Yours, very respectfully,

WILLS, EDMANDS & CO.

To Hon. THOMAS RUSSELL,
Collector.

Record office, May 8, 1875. Custom-house.

A true record. Attest:

JOHN G. STETSON, *Clerk.*

14 UNITED STATES OF AMERICA,
Massachusetts District, ss:

I, John G. Stetson, clerk of the circuit court of the United States for the first circuit and district of Massachusetts, do hereby certify that the foregoing is a true copy of the record and full proceedings in the cause of R. A. Wills et al., plaintiffs, v. Thomas Russell, defendant, in said circuit court determined.

In testimony whereof I hereunto set my hand and affix the seal of said circuit court, at Boston, in said district, this seventh day of October, in the year of our Lord one thousand eight hundred and seventy-six, and of the Independence of the United States the one hundred and first.

[SEAL.] JOHN G. STETSON, *Clerk.*

15 *Bond to party on appeal.*

Know all men by these presents that we, R. A. Wills, of Newburyport, in the commonwealth of Massachusetts, W. S. Edmands and P. S. Edmands, both of Calcutta, India, and J. C. Edmands, of the city of Brooklyn, State of New York, copartners, under the style and firm name of Wills, Edmands & Co., having a principal place of business in Boston, in said Massachusetts, as principals, and Henry Hobart, of Grantville, and Benjamin Lincoln, of said Boston, both in said commonwealth, as sureties, are held and firmly bound unto Thomas Russell, formerly collector of the customs for the revenue district of Boston and Charlestown, in the full and just sum of three hundred dollars, to be paid to the said Thomas Russell, his certain attorney, executors, administrators, or assigns; to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated the seventh day of October, in the year of our Lord one thousand eight hundred and seventy-six.

Whereas lately at a circuit court of the United States within and for the district of Massachusetts, in a suit depending in said court between said R. A. Wills, W. S. Edmands, P. S. Edmands, and J. C. Edmands, plaintiffs, and said Thomas Russell, defendant, decree was rendered against the said plaintiffs, and the said plaintiffs having obtained an appeal to remove the said cause to the Supreme Court of the United

States to reverse the decree in the aforesaid suit, and a citation directed to the said defendant citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October, A. D. 1876:

Now the condition of the above obligation is such that if the said plaintiffs shall prosecute their said appeal to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

WILLS, EDMANDS & CO. [L. S.]
HENRY H. HOBART. [L. S.]
BENJ. LINCOLN. [L. S.]

Signed, sealed, and delivered in the presence of—
W. B. HARTFORD.

Approved:

JOHN LOWELL,
District Judge.

A true copy of the bond taken by the judge at the time of allowing the appeal named in said bond, which bond is on file in the office of the clerk of the circuit court of the United States for the first circuit and district of Massachusetts.

Attest:

JOHN J. STETSON,
Clerk U. S. C. C., Mass. Dist.

(Indorsement on cover:) No. 356. R. A. Wills, W. S. Edmands, P. S. Edmands, & J. C. Edmands, copartners as Wills, Edmands & Co., plaintiffs in error, vs. Thomas Russell, late collector of customs. Massachusetts C. C. U. S. Filed 31st March, 1877.

UNITED STATES SUPREME COURT.

No. 126.

R. A. WILLS ET ALS.

v.

THOMAS RUSSELL, LATE COLLECTOR OF CUSTOMS.

STATEMENT AND BRIEF FOR PLAINTIFFS IN ERROR.

United States Supreme Court.

No. 126. OCTOBER TERM, 1879.

R. A. WILLS ET ALS.

v.

THOMAS RUSSELL, *Late Collector of Customs.*

STATEMENT AND BRIEF FOR PLAINTIFFS IN ERROR.

STATEMENT OF CASE.

The plaintiffs in error imported into the port of Boston in October, 1872, one hundred and twenty-five bales of jute rejections from Calcutta. The defendant as collector exacted thereon a duty of 10 per cent *ad valorem*, under Section 24 of the Act of March 2, 1861, 12 Statute 196, as a non-enumerated unmanufactured article, and in addition a duty of ($5) five dollars per ton, under Section 11 of the Act of July 14, 1862, 12 Statute 554, as a vegetable substance not enumerated. Plaintiffs admitted the correctness of the exaction of the 10 per cent *ad valorem*, but denied that the $5 per ton was legally due. The issue is as to the construction of Section 11 of the Act of 1862, whether the words "other vegetable substances not enumerated" refer to those "used for cordage" as in the Act of 1861, or were they meant to be applied generally over the whole vegetable kingdom.

ERRORS ASSIGNED.

First. The circuit judge permitted a witness for the plaintiffs to be cross-examined on a matter not connected with the matters stated in his direct examination, against the objections of the plaintiffs.

Second. Excluding and refusing to permit the plaintiffs on the ground that it was "immaterial" to offer evidence tending to show that the import "jute rejections" were not, had never been and could not be used for cordage, and that "jute," "sisal grass," "sun hemp" and "coir," and other vegetable substances of the statute defendant relied on, were used for cordage.

Third. In connection with such exclusion of plaintiffs' profert of testimony, admitting the defendant to put in evidence tending to prove (see error 1) that jute rejections were one of the vegetable substances referred to in Section 11 of the Act of 1862.

Fourth. Error rejecting the following prayer for instructions offered by the plaintiffs: —That Section 15 of the Act of March 2, 1861, and Section 11 of the Act of July 14, 1862, and the provision in Schedule C, Section 2504, of the Revised Statutes of the United States, must be construed together, and full effect given to the words "used for cordage," as restrictive in the application of Section 11 of the Act of July 14, 1862, in the assessment of duties.

Fifth. Error in rejecting the following prayer for instructions offered by the plaintiffs: — That the words "used for cordage" by necessary implication of law are to be implied in Section 11 of the Act of July 14, 1862.

Sixth. Error in rejecting the following prayer for instructions offered by the plaintiffs: — That the provision in Schedule C, Section 2504 of the Revised Statutes of the United States, as follows, "vegetable substances used for cordage," was a legislative declaration on the first day of December, 1873; that such was the state of the law, and it is necessarily a construction of Section 11 of the Act of July 14, 1862, in connection with Section 15 of the Act of March 2, 1861. It was the declared purpose of Congress to collate all the statutes as they were at that date, and not to make any change in their provisions.

Seventh. Error in rejecting the following prayer for instructions, offered by the plaintiffs: — If the jury shall find that, commercially, jute rejections were not used for cordage, then they were not liable to the duty imposed by the defendant under Section 11 of the Act of July 14, 1862, and their verdict must be for the plaintiffs.

Eighth. In connection with the several refusals of said prayers, charging the jury that it was for them to find whether or not jute rejections were of a class of non-enumerated vegetable substances similar to the enumerated articles in Section 11 of the Act of July 14, 1862.

Ninth. Error in the charge given by the circuit judge in not defining in what the similarity should consist, to bring plaintiffs' import within the statute aforesaid.

ARGUMENT AND BRIEF.

The first objection is on the order of proof in the cause. One of the plaintiffs was called as a witness in the putting in of their *prima facie* case to prove the payment of the duty alleged to be illegally exacted, and that protest and appeal were made by him in due time. The defendant on cross-examination examined the witness on the point whether jute rejections were a vegetable substance similar to the enumerated articles in the Section 11, 1862, clause 2.

The plaintiffs seasonably objected to the questions on the ground

that the witness had not testified in chief on this point; but the judge overruled the objection and permitted the questions to be asked.

In the Philadelphia and Trenton Railroad *v.* Stimpson, 14 Peters, p. 461: "The broader principle now well established. . . . A party has no right to cross-examine any witness, except as to facts and circumstances connected with the matters stated in his direct examination. If he wishes to examine him to other matters he must do so by making the witness his own and calling him as such in the subsequent progress of the cause." Reaffirmed in Houghton *v.* Jones, 1 Wall. p. 704.

This is not an exception to the discretion of the court as to the order of proof or conduct of the trial.

The cases cited embody the philosophy of the law of evidence, which no Circuit Court has jurisdiction to overrule and which were announced with the authority of a rule of court.

The instruction of the judge that the jury were to find whether the jute rejections were of a class similar to the articles enumerated in Section 11, 1862, when coupled with his refusal of our profert of evidence to show that the enumerated articles were used for cordage, and that jute rejections were not, never have been, and cannot be used for cordage, was error.

Section 11, of Act of 1862, under which the duty complained of was exacted, it will be seen is not in lieu of, it is not a repeal of prior classifications and duties, but simply additional. For convenience of reference and as illustrative it is inserted in full, also its parent, Section 15 of the Act of March 2, 1861, 12 Stat. 186.

Section 15, Act of March 3, 1861.

That from and after the day and year aforesaid, there shall be levied, collected and paid the following duties, that is to say: —

1. On unmanufactured hemp, $35 per ton.
2. On manilla and other hemps of India, $15 per ton.
3. On jute, sisal grass, sun hemp, coir and other vegetable substances not enumerated, used for cordage, $10 per ton.
4. On jute butts, $5 per ton.
5. On codilla or tow of hemp, $10 per ton.
6. On tarred cables or cordage, 2½ cents per pound.
7. On untarred manilla cordage, 2 cents per pound.
8. On all other untarred cordage, 3 cents per pound.
9. On hemp yarns, 4 cents per pound.
10. On coir yarns, 1 cent per pound.
11. On seines, 6 cents per pound.
12. On cotton bagging or any other manufacture not otherwise provided for, suitable for uses to which cotton bagging is applied, whether composed in whole or in part of hemp, jute or flax, or any other material valued at less than 10 cents per square yard, 1½ cents per pound.
13. Over 10 cents per square yard, 2 cents per pound.
14. On sail duck, 25% ad val.
15. On Russia and other sheetings, brown or white, 25% ad val.
16. On all other manufactures of hemp or of which hemp shall be a component part, not otherwise provided for, 25% ad val.
17. On unmanufactured flax, $15 per ton.
18. On tow of flax, $5 per ton.
19. On grass cloth, 25% ad val.
20. On jute goods, 15% ad val.
21. On all other manufactures of jute or sisal grass, not otherwise provided for, 20% ad val.

Section 11 of the Act of July 14, 1862.

In addition to the duties heretofore imposed, there shall be levied, collected and paid on the goods, wares and merchandise herein enumerated: —

3. On jute, sisal grass, sun hemp, coir and other vegetable substances not enumerated except flax (17), tow of flax (18), Russia (1), and manilla (2), hemp and codilla or tow of hemp, $5 per ton.
4. On jute butts, $1 per ton.
6. On tarred cables or cordage, $\frac{1}{4}$ cent per pound.
7. On untarred manilla cordage, $\frac{1}{4}$ cent per pound.
8. On all other untarred cordage, $\frac{1}{2}$ cent per pound.
9. On hemp yarn, 1 cent per pound.
10. On coir yarn, 1 cent per pound.
11. On seines, $\frac{1}{2}$ cent per pound.
12. On cotton bagging or any other manufactures not otherwise provided for, suitable for the uses to which cotton bagging is applied, whether composed in whole or in part of hemp, jute, or flax or any other material valued at less than 10 cents per square yard, $\frac{1}{4}$ cent per pound.
13. Over 10 cents per square yard, 1 cent per pound.
14. On sail duck, 5% ad val.
15. On Russia and other sheetings made of flax or hemp, brown and white, 5% ad val.
16. On all manufactures of hemp or of which hemp shall be a component part, not otherwise provided for, 5% ad val.
19. On grass cloth, 5% ad val.
20. On jute yarns (see Act Aug. 5, 1861, Section 6, 12 Stat. 294), 5% ad val.
21. On all other manufactures of jute or sisal grass, not otherwise provided for, 5% ad val.

The circuit judge admitted there must be a similarity beyond the mere vegetable nature, but rejected proof of the similarity which Congress avowed was their reason for classing these substances together at $10 a ton, in the Act of 1861, to which this Act was additional *in pari materia*, not a repealing statute.

Kohlsaat *v.* Murphy, and cases there cited, 6 Otto, p. 160.

In Bend *v.* Hoyt, 13 Peters, 272, the Court construed "hosiery" by its connection, to be limited to woollen and not to include "silk hose." We invoke that rule of interpretation here. See also Elliott *v.* Swartout, 10 Peters, 152, the Court implied *worsted* as descriptive of shawls. The acts of 1861 and 1862 were *in pari materia* on this subject. Section 15 gives the reason for separating "jute butts" from jute, sisal grass, sun hemp, coir and other vegetable substances, when it makes "used for cordage" the test of the classification. The duty, $10 a ton for the jute, $5 per ton for the "butts," is another exposition of the same reason.

Section 11 of the Act of 1862 retains the classification of the clause of Section 15, 1861, using the same names of merchandise that designate the class in Section 15. It engrafts an exception on the scope of this clause of Section 11, which excludes flax, tow of flax, Russia and manilla hemp and codilla from liability to the additional duty, but in looking at Section 15 you find these articles were not included in the clause which corresponds to this. It must then be understood as referring to the original Act of 1861, Section 15, for the description of the kind or condition of the jute and other vegetable substances which the additional duty is to operate on as unenumerated, those, viz., "used for cordage."

Dwarris on Stat., p. 569, ed. 1848: "It is to be inferred that a Code of Statutes relating to one subject was governed by one spirit and policy, and was intended to be consistent and harmonious in its several parts and provisions." *Sic* 6 Otto, p. 160.

In this light it clearly was not the intent of Congress that this should be an enlarging clause, though an additional duty was levied.

Look at the clauses following in this Section 11 of Act 1862: "Tarred cordage and untarred manilla cordage are taxed $5 per ton additional; other untarred cordage, coir yarn and seines, $10 per ton; hemp yarn, $20 per ton." This is in harmony with the idea that the "other vegetable substances" preceding it, and taxed $5 per ton additional, were intended to mean those "used for cordage," as had been said in 1861, which is still in force.

In the theory of Section 15, 1861, jute yarns (so amended Section 6, August, 1861, "goods" being struck out) pay 15 per cent, and other manufactures of jute and sisal grass not otherwise provided for pay 20 per cent. In Section 11, 1862, additional duties of 5 per cent ad val. are levied on these classes by name, and on grass cloth, but

jute goods" disappear with the repeal in August, '61, of the name. There is an inference that Congress did not intend to tax a raw material not grown in the United States higher than the manufactures of that material, and these light advances still show that when you distinguish the superior commercial quality of the "used for cordage" in the raw, and "cordage and yarns" in the manufactured, from the other and lighter textile uses of the inferior buts and rejections of these fibrous substances, you have harmony in the context of each clause.

By reference to the two tabulated sections of law, it is conclusively evident that Congress had Section 15 of 1861 in mind when making Section 11 of 1862: the same names, the same order is used, and the exception of Russia hemp, etc., shows that they had the cordage quality in their mind and declined to advance these which otherwise would come in the scope of the "used for cordage." The draftsman, not having before his mind that general words would not affect particular nomenclatures (6 Otto, 135–143; 5 Otto, 144), inserted there expressions of an intent that this clause should not be broader than in the original, to which it was an addition. Another and stronger argument is drawn from the rate of duty on "jute butts." They are only distinguishable from "jute used for cordage," by the fact that they are refuse, rejected in preparing the fibre for cordage purposes, and are used here either for paper stock or for making bagging after being prepared. Section 15, 1861, taxes jute butts $5 per ton and jute for cordage $10 per ton; Section 11, 1862, advances jute $5; jute butts $1, or only one fifth as much.

These all concur to show that in the intent of the legislature the words in Section 11 had reference to and were meant to have the same scope (*minus* the exception, which was tautology: the law would have implied it) exactly as the Section 15 had.

Another:—

The Revised or General Statutes, in codifying the tariff law in 1874, render this clause, "Jute, sun and sisal grass, and other vegetable substances used for cordage." See Schedule C, Section 2504.

"Jute, sun and sisal grass and other vegetable substances not enumerated used for cordage, fifteen dollars per ton."

See Section 15 of 1861, ten dollars, and Section 11 of 1862, five dollars. Coir made free Sect. 5, Act of June 6, 1872, 17 Stat. 234.

This is a legislative interpretation of the existing statutes. A declaration of the law, whether conclusive or not, still evidence of the *construction in pari materia* and contributing to the exposition of the prior statute.

Arthur v. *Homer*, 6 Otto, p. 140.
Smythe v. *Fiske*, 23 Wall. 382.

"Jute rejections" were not known in commerce prior to about 1870. Before that this material was not utilized. It is the refuse

in preparing jute for cordage other than the "jute butts," and is used for like purposes in this country to jute butts. Historically, as an import it was classed with jute butts, under the similitude clause, until the Act of 1872 . . . made jute butts free. Thereupon the collector made a new classification of ten per cent *ad valorem* under the "non-enumerate clause, Section 24, 1861," and $5 per ton under Section 11, 1862, and plaintiff protested.

The proposition of the Treasury, in 1872, distinctly appears to be—

1. That this import was neither "jute," etc., nor "jute butts," of 1861, but was a non-enumerate article of that statute.

To this extent we assent.

2.. That Section 11, 1862, distinctly applied to the general non-enumerate clause of 1861, Section 24, and taxed "all vegetable substances" in that clause of 1861 with $5 per ton duty.

To this we do not assent.

It is absurd to foist into Section 11 such a crew of implications of removals and vague generalities when its reference to the use of these substances for cordage so thoroughly permeates the entire context of the section, and that other one, Section 15, to which it is an addition.

What should vegetable fungi like "dried mushrooms," or acorns, artichokes, or spruce gum have to do in context with Section 11, or "hay" or "straw" (see Secretary's circular, April 8, 1868, and May 4, 1870, rating them as "unenumerate" of Section 24, 1861).

Judge Clark in the trial below limited to the jury this broad construction by stating the vegetable substances should be "*similar*" to jute, sisal, etc., but he *refused* to say they should be similar in that quality which made the jute *dutiable* originally in Section 15, and in this was erroneous, although he was right in rejecting the broad proposition.

It is not, then, all other vegetable substances not enumerated that shall pay the additional $5 per ton, but those which are classed in taxable attributes with the tax imposed *eo nomine* on jute, sisal, etc. This attribute is not that the import is jute or coir generally, but that it is such jute, sisal, or coir as is "used for cordage," and such "other vegetable substances."

Or again: The jute, sisal, etc., referred to are those kinds "used for cordage," for in the same breath we have "jute butts," which are the refuse from the cordage fibre, taxed so far below and valued so far below that the distinction cannot be overlooked.

Under the rule in Murphy *v.* Arnson, 6 Otto, 133, "that similitude of use means its employment or its effect in producing results," the identities between jute butts and jute rejections are absolute; nor can either of them be confounded with that vegetable substance "jute," used for cordage.

Or again: "Jute," in commerce, is that prepared fibre which is suitable for cordage.

The profert of the plaintiffs of evidence that in 1862 jute and the other named substances were used for cordage, and that "jute rejections" were not then and have not and never can be used for cordage, was *material evidence* in either the plaintiffs' construction of the law, or that which the judge gave to the jury, viz., to find whether they were *similar* to the enumerated articles of Section 11.

One of the elements of similarity is whether the two things are capable of the same use or adapted to the same use.

The record already shows *three* commercial articles, — jute, jute butts and jute rejections, — the variety of whose values and uses or adaptations for use necessarily enter into the question of their similitude to each other.

Another is quality in the article, illustrated in the Patent Law under *infringement*.

The judge only defined his meaning of "similarity" by rejecting our profert to show that the two commercial articles were not capable of being used for the same purpose.

True, the process that makes the jute for cordage makes the rejections and the butts.

It extracts the "jute" from the plant, it separates it from the "butts" and "jute rejections." So, also, in the brewery, the beer is extracted from the barley, and the spent grain left. In the distillery, the whiskey from the corn. But these rejected, spent grains are not similar to beer or whiskey, or the original barley or corn. Their uses differ, though their origin is the same. So, also, sugar cane is divided into molasses, sugar and bagasse, the last only fit for fuel.

The similarity of use was an element of the question of similarity we should have been allowed to put before the jury:—

1. To prove the quality of the jute of commerce and the statutes.

2. To prove the quality of the "jute rejections."

3. Whether this import was one of the "other vegetable substances" of the clause, is a question for the jury, an issue. (*Tyng* v. *Grinnel*, 2 Otto, 468.) The profert was of testimony to show the import was not of that category. The issue was whether or not it was.

4. The Court had permitted (see folio 9) the defendant to examine, on cross, one of the plaintiffs on this very question of similarity of jute rejections to the vegetable substances of Section 11 without having opened it in chief and against our objection. When plaintiffs came to that topic and offered to show the dissimilarities on this issue of resemblance, the Court refused to permit us to offer the evidence to the jury.

The substance of our profert may not have been *conclusive* on the issue, but surely the judge erred in saying it was *immaterial* to the

issue he had allowed the defendant to open, and which he charged to the jury. The plaintiff did not ask the judge to admit it because it *was conclusive*, nor to define its effect on the issue: he claimed it was relevant to the issue.

The judge did not tell the jury that the enumerated articles were such articles as in the commercial understanding bore the names of the statute. Hence he gave no legal standard by which similarity could be tested, but left the jury free to infer that botanical names, or unrotted, unhackled, and undressed plants were the standard rather than the specially prepared and dressed fibres, known in commerce as jute, sisal grass, coir, etc., and the verdict proves nothing, when the judge, after rejecting our proferts and prayers pointing to this commercial understanding, gave the jury no legal standard for their duty of comparison, the strong and misleading inference against their understanding jute, etc., according to the commercial understanding must have been left on their minds.

All of which is respectfully submitted.

CHAS. LEVI WOODBURY,
Counsel for Plaintiffs in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1879.

R. A. WILLS ET AL.
v.
THOMAS RUSSELL.
No. 126.

ERROR TO UNITED STATES CIRCUIT COURT, MASSACHUSETTS.

DEFENDANT'S BRIEF.

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ERROR TO UNITED STATES CIRCUIT COURT, MASSACHUSETTS.

DEFENDANT'S BRIEF.

STATEMENT.

This was an action to recover from a former collector of customs for the port of Boston the sum of $83.19, paid as duties under protest upon an importation from India of jute rejections made by the Melrose, September 17, 1872. The pleadings may be referred to as part of this bill of exceptions. A duty of 10 per cent. ad valorem had been assessed and paid under section 24 of the tariff act of March 2, 1861, also $5 per ton under section 11 of the tariff act of July 14, 1862, and this action was to recover back the $5 per ton.

The plaintiffs, after evidence tending to show payment by them to the defendant of the duties alleged, put in and read their protest for the purpose of showing that they had complied with section 14 of the act of June 30, 1864, chap. 171 (13 Stat. at L., 214). A copy of said protest is hereto annexed as part of this bill of exceptions. The defendant claimed upon cross-examination the right to examine one of the plaintiffs who had testified in chief to the fact of payment of the duties, and the fact of protest and appeal, but had not testified in chief as to what jute rejections were, or as to the contents of the protest, with a view of showing that jute rejections were a vegetable substance within the eleventh section of the tariff act of July 14, 1862, chap. 163 (12 Stat. at L., 554).

The plaintiffs objected upon the ground that the witness had not testified in chief upon the subject inquired of, but the court overruled the objection, and permitted the witness to be examined as to whether jute rejections were a vegetable substance similar to the enumerated articles in the second clause of section 11 of the tariff act of July 14, 1862, what they were, and how jute was grown. To this ruling the plaintiffs excepted. The plaintiffs claimed that the vegetable substance not enumerated, named in the second clause of section 11 of the tariff act of July 14, 1862, were limited to vegetable substances used for cordage, and offered to show that, in 1862, jute, Sisal grass, sun hemp, and coir, were used for cordage, and that jute rejections were not then and have never been used for cordage, and cannot be so used. This profert of evidence was objected to, and rejected by the court as immaterial. To this ruling the plaintiffs excepted.

The plaintiffs asked the court to instruct the jury as follows:

First. That section 15 of the act of March 2, 1861, and section 11 of the act of July 14, 1862, and the provision in Schedule C, section 2,504 of the Revised Statutes of the United States, must be construed together, and full effect be given to the words "used for cordage" as restrictive in the application of section 11 of the act of July 14, 1862, in the assessment of duties.

Second. That the words "used for cordage," by necessary implication of law, are to be implied in section 11 of the act of July 14, 1862.

Third. That the provision in Schedule C, section 2,504 of the Revised Statutes of the United States, as follows, "vegetable substances used for cordage," was a legislative declaration on the 1st day of December, 1873, that such was the state of the law, and it is necessarily a construction of section 11 of the act of July 14, 1862, in connection with section 15 of the act of March 2, 1861. It was the declared purpose of Congress to collate all the statutes as they were at that date, and not to make any change in their provisions.

Fourth. If the jury shall find that, commercially, jute rejections were not used for cordage, then they were not liable to the duty imposed by the defendant under section 11 of the act of July 14, 1862, and their verdict must be for the plaintiffs.

The court declined so to instruct the jury; but instructed them that it was for them to find whether or not jute rejections were of a class of non-enumerated vegetable substances similar to the enumerated articles in section 11 of the act of July 14, 1862. If they were, then the duty was properly assessed; if not, then their

verdict must be for the plaintiffs. The jury returned a verdict for the defendant, and the plaintiffs excepted to the above rulings and refusals to rule.

STATUTES.

These are the pertinent sections or portions of sections of the several statutes mentioned in the exceptions:

Act of March 2, 1861. "SEC. 15. *And be it further enacted*, That from and after the day and year aforesaid [April 1, 1861], there shall be levied, collected, and paid on the importation of the articles hereinafter mentioned the following duties, that is to say—

"First. On unmanufactured hemp, $35 per ton; on manila and other hemps of India, $15 per ton; on *jute*, Sisal grass, sun hemp, coir, and other vegetable substances not enumerated, *used for cordage*, $10 per ton; on jute butts, $5 per ton; on codilla, or tow of hemp, $10 per ton; on tarred cables or cordage, two cents and a half per pound; on untarred manila cordage, two cents per pound; * * * on *jute goods*, 15 per cent. ad valorem; on all *other manufactures of jute* or Sisal grass, not otherwise provided for, 20 per cent. ad valorem." (12 Stats., 186, § 15.)

"SEC. 24. *And be it further enacted*, That from and after the day and year aforesaid there shall be levied, collected, and paid on the importation of all *raw* or *unmanufactured* articles, not herein enumerated or provided for, a duty of 10 per centum ad valorem; and on all articles *manufactured in whole or in part*, not herein enumerated or provided for, a duty of 20 per centum ad valorem." (12 Stats., 196, § 24.)

The act of July 14, 1862, section 11, imposed these (among other) *additional* duties: "On jute, Sisal grass, sunn hemp, coir, and *other vegetable substances not enumerated* (except flax, tow of flax, Russia and manila hemp, and codilla or tow of hemp), $5 per ton; on *jute butts*, $1 per ton; on tarred cables, ¼ of one cent per pound; on untarred manila cordage, ¼ of one cent per pound; on all other untarred cordage, ½ of one cent per pound; * * * on *jute yarns*, 5 per centum ad valorem; on all other manufactures of jute or Sisal grass, not otherwise provided for, 5 per centum ad valorem." * * * (12 Stats., 554, § 11.)

The Revised Statutes, section 2504, Schedule C, place the duty "on jute, sunn, and Sisal grass, and other vegetable substances not enumerated, used for cordage, $15 per ton." * * * (Rev. Stat., edition of 1878, p. 462, Schedule C.)

This law (§ 2504) was not in force at the time any of the importations in question became dutiable, but was quoted *arguendo* at the trial.

The statute of June 30, 1864, c. 171, § 14, mentioned in the exceptions, relates only to the time and manner of making protest, about which there is no question in this case.

BRIEF

I.

The exception to the cross-examination by the defendant of one of the plaintiffs, under the circumstances and for the purpose mentioned, is untenable.

1. The plaintiff had identified and put in the protest. The paper itself really constituted part of his examination in chief. He could not testify directly "to the *contents* of the protest," because the writing was its own best evidence of this fact; but he could and did testify to the existence, identity, and genuineness of the protest, and produced it in the cause. Thereby he in effect offered to the jury the statement of himself and partners upon the very subject as to which he was cross-examined. This is altogether different from the case of a subscribing witness, produced only to authenticate the instrument he has attested, but not responsible for, nor interested in, perhaps ignorant of, its contents or purpose.

True, this court has said, in 14 Peters, 461, and in 1 Wallace, 706, that "the cross-examination of a witness must be limited to matters stated in his direct examination;" but in those cases the question was whether the judgment should be reversed because of the *refusal* to permit new matter to be introduced upon cross-examination.

It is believed that *no instance can be found in which a judgment has been reversed*, and a verdict set aside, *because the court allowed the introduction into the cross-examination of matters not mentioned in the direct testimony.* This is left to the discretion of the judge presiding at

the trial. In the first of the above-named cases this court said: "The mode of conducting trials, the order of introducing evidence, and the times when it is to be introduced, are properly matters belonging to the practice of the circuit courts, with which this court ought not to interfere, unless it shall choose to prescribe some fixed general rules on the subject under the authority of the act of Congress. Probably the practice in no two States of the Union is exactly the same; and, therefore, in each State the circuit courts must necessarily be vested with a large discretion in the regulation of their practice." (Philadelphia and Trenton Railroad Company *v.* Stimpson, 14 Peters, 463.) It may be remarked that in Massachusetts the cross-examination is not thus limited, while in Pennsylvania it is. Compare Moody *v.* Rowell (17 Pick., 490), with Ellmaker *v.* Buckley (16 S. & R., 77).

Field, J., in the second Federal case mentioned (Houghton *v.* Jones, 1 Wall., 706), cites 1 Greenl. on Ev., § 445, in support of the language (above quoted) of his opinion. In that section Professor Greenleaf, citing 14 Peters, says "that a party has no right to cross-examine any witness except as to facts and circumstances *connected* with the matters stated in his direct examination." Here that connection existed.

2. He was a person adversely interested—the adverse party. The examination of such an one may take the form of cross-examination, even if directly called to the stand by his opponent. By parity of reasoning, the same course of interrogation may be pursued where one takes the witness-stand in his own behalf.

3. This is mere matter of procedure upon the trial, to

be regulated by the presiding judge in his discretion, and not subject of exception. (Philadelphia, &c., Company *v.* Stimpson, 14 Peters, 463, above cited; 1 Greenleaf on Ev., § 431, where the writer observes, "that the subject lies chiefly in the discretion of the judge before whom the cause is tried, it being susceptible from its very nature of but few positive and stringent rules." Steene *v.* Aylesworth, 17 Conn., 254, top; Legg *v.* Drake, 1 Ohio St., 290; Thayer *v.* Barney, 12 Minn., 502; Rand *v.* Newton, 6 Allen, 39; Prescott *v.* Ward, 10 Allen, 203; Stroudenmeier *v.* Williamson, 29 Ala., 564; Campau *v.* Dewey, 9 Mich., 415, middle.)

4. The plaintiffs show no injury resulting to them—nothing whereby they were aggrieved—in the pursuance of the course adopted; so this exception is immaterial. (Greenleaf *v.* Birth, 5 Peters, 135; Bryant *v.* R. R. Co., 61 Me., 302; Brooks *v.* Goss, *Ib.*, 307; Lord *v.* Kennebunkport, *Ib.*, 463; McLoon *v.* Spalding, 62 Me., 315; Millett *v.* Marston, *Ib.*, 477; State *v.* Goold, *Ib.*, 511, 512, and authorities *passim.*)

That jute rejections were a vegetable substance, and not animal, mineral, or gaseous, was something of which the court would take judicial cognizance. (Brown *v.* Piper, 91 U. S., 42.) The nature and characteristics of the article were something the plaintiffs must have been prepared to prove to maintain their suit, since the burden of showing an illegal exaction was upon them. (Arthur *v.* Ukhart, 96 U. S., 118.) That one of the importers was himself asked to state the character of his importations a few minutes earlier than was anticipated cannot make any very material difference to him or his partners. The sole issue really contested is one of law—whether the

statute of 1862, imposing the additional $5 a ton, should be read as if it contained the qualifying words, found in the previous enactment and in the Revised Statutes "used for cordage."

II.

If the plaintiffs were wrong in confining the "vegetable substances" mentioned in the above-cited clause of section 11 of the act of July 14, 1862, to those used for cordage, then the refusal to receive their testimony (that jute rejections were not so used) was proper.

The same consideration disposes of the four special instructions requested by the plaintiffs. (Record, 4.)

Their position requires the interpolation of three words into the statute, effecting an important qualification and limitation of the language actually employed by Con gress.

There is no need to look back to the preceding statute, nor to the subsequent passage of the revision. (Ingalls *v.* Cole, 47 Maine, 540, middle.) The language of the law applicable to this case is clear, unambiguous, easily understood, without any such recourse to other means of interpretation. (Purdy *v.* People, 4 Hill, 397, 403; Opinion, 7 Mass., 523–4.)

That Congress intended the additional $5 per ton to be levied upon a different basis than that found in the special language of the first clause of section 15, act of March 2, 1861—which is qualified by the expression "used for cordage"—is evident from the exception, in the act of July 14, 1862, § 11, of "flax, tow of flax," codilla, &c. *Exceptio unius*, &c. In the earlier act flax, codilla, &c., were not included in the sentence qualified by the phrase "used for cordage"; yet it was plainly

seen that they would have come within the category of "other vegetable substances not enumerated" in the later statute, had they not been expressly excepted.

This act of July 14, 1862, did not refer back, item by item, to that of March 2, 1861. On the contrary, it said, in substance, that in addition to whatever duties (by any pre-existing statute whatever) might already be laid upon the articles or substances named, a further sum should be levied as therein provided.

III.

The instruction given was correct. In the protest, which is the basis of their action, and by which they are bound, the plaintiffs declared that "jute rejections are not enumerated in any tariff act in force, consequently can only be subjected to duty as a non-enumerated article," and go on to show that they came under section 24 of the act of March 2, 1861, making them dutiable at 10 per cent. They are certainly vegetable substances. They are non-enumerated vegetable substances, being other than those particularly mentioned. If the jury were satisfied that they were "*similar*" to the specified substances, then they could apply the law to the facts thus ascertained, and say that the duty was rightly collected. It may be noticed that the instruction given was fully as favorable as the plaintiffs could claim, because the jury were told that their verdict was to be governed by their finding upon the question of similarity; while the statute did not *expressly* require the "other vegetable substances" to be similar to those named, and if this were required, it was only by an application of the principle "*ejusdem generis*" to the language of the statute.

The question of difference or similarity, if it arose in the case, was peculiarly one for the determination of the jury.

EDWIN B. SMITH,
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